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Realism in Psychology and Humanism in Law: Psycholegal Studies at Nebraska

I. THE HISTORY OF LAW AND SOCIAL SCIENCE AT NEBRASKA

A. The Growth of the Law/Psychology Program

This two-issue Symposium—the first Symposium on psychology and law in any general law review—establishes another landmark in the history of psychology and law at the University of Nebraska.¹ In 1974, the first student entered the Law/Psychology Program (the “Nebraska Program”), the first such graduate training program. Since then, the Nebraska Program has persisted as the largest and most diverse program in the field.

The Nebraska Program also remains on the cutting edge of the psycholegal studies movement.² To some extent, this influence simply reflects the scope of the Nebraska Program. In both breadth and

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1. See also 33 NEBRASKA SYMPOSIUM ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT (G. Melton ed. 1985) (invited symposium conducted during 1984-85, the Law/Psychology Program’s 10th-anniversary year). The Nebraska Symposium on Motivation is the oldest and most prestigious continuing symposium in any field of psychology.
2. The Nebraska Program is generally recognized as the “reference point for the development of any new programs” on psycholegal studies. PSYCHOLOGICAL SCIENCES SUBCOMM., MENTAL HEALTH RESEARCH EDUCATION REVIEW COMM., NATIONAL INSTITUTE OF MENTAL HEALTH, SUMMARY STATEMENT ON THE UNIVERSITY OF NEBRASKA-LINCOLN PROGRAM ON MENTAL HEALTH POLICY AND FORENSIC RESEARCH 2 (Feb. 26-28, 1986). Over the years, the Nebraska Program has been the focus of numerous external evaluations by University-commissioned panels (as part of periodic self-studies in the Department of Psychology and the College of Law), various accrediting bodies, and peer review panels of the NIMH. We have been fortunate to receive uniformly positive evaluations that have in-

quantity of scholarship in psycholegal studies, the Nebraska Program is unique. For example, the Program's influence and productivity were strikingly illustrated at the last biennial meeting of the American Psychology-Law Society ("AP-LS"),³ the major scholarly society in the field. Although AP-LS has grown to nearly 1,700 members, about 20% of the presentations at the meeting were made by scholars connected with the Nebraska Program.⁴

The Nebraska Program also is prominent in the governance of AP-LS. I am its president, and my colleague Alan Tomkins is a member of the executive committee. Michael Saks, an adjunct faculty member in the Program, is a past president as well as past editor of *Law and Human Behavior*, the AP-LS journal. James Ogloff, the original editor of this Symposium and a recent graduate of our J.D.-Ph.D. program, is past student chair, and another student in the Nebraska Program, Jessica Greenwald, is the current chair. The first director of the Nebraska Program, Bruce Sales, is now the AP-LS representative in the Council of Representatives of the American Psychological Association.⁵

The Nebraska Program's leading role in psycholegal studies, how-

cluded notice of the Nebraska Program's preeminent and pioneering status among graduate training programs in psycholegal studies.

As an innovative effort to provide interdisciplinary training, the Nebraska Program also has been the focus of several articles in the APA Monitor, the monthly newspaper of the American Psychological Association. See, e.g., Fisher, *Nebraska Students Meld Science, Law and Politics*, APA Monitor, Aug. 1986, at 14, col. 1; Moses, *Programs Bridge Law, Psychology*, APA Monitor, Feb. 1990, at 38, col. 1; Wolinsky, *Programs Join "Distrustful" Disciplines*, APA Monitor, Feb. 1982, at 15, col. 1.

3. Now a division of the American Psychological Association ("APA"), AP-LS formerly was a free-standing society, which retained its name after it merged with the APA Division of Psychology and Law. Although now a division of APA, it continues to welcome non-psychologists as members.

Consistent with that mixed structure, AP-LS holds annual meetings in conjunction with the APA convention, but AP-LS also holds an independent biennial meeting. The most recent such biennial meeting was held in March 1990 in Williamsburg, Virginia.

4. A list of the presentations by individuals associated with the Nebraska Program is provided in Appendix A. As discussed *infra*, the presentations by the Nebraska group were notable as much for their unconventional topics as for their number.
5. Now a member of the psychology, law, and sociology faculties of the University of Arizona, Professor Sales served as director of the Nebraska Program from its inception until 1981. A past president of AP-LS, he also was founding editor of *Law and Human Behavior*.

Dean Harvey Perlman long served as associate editor of *Law and Human Behavior*. I also have served in that role.

The national stature of the Nebraska Program also is illustrated by the honors that have come to Program faculty. Professor Saks and I both have been fortunate to receive APA's Award for Distinguished Contributions to Psychology in the Public Interest, and Ross Thompson received the Boyd McCandless Award,

ever, is not simply a matter of quantity.⁶ Indeed, examination of this Symposium in the context of developments in the Nebraska Program gives important clues to the evolution of psychology and law thus far and to the potential of such studies as a foundation for realism in psychology and humanism in law—values that guide the Nebraska Program and underlie this Symposium.

Although the themes discussed in this Introduction do not exhaust the list of the Nebraska Program's principal attributes, they do provide a glimpse of the approach that has distinguished the Nebraska Program.⁷ Perhaps the most notable beginning point is that the Nebraska Program has found a hospitable home in a university in which

the APA Division of Developmental Psychology's award for distinguished early career contributions.

6. The sheer size of the Nebraska Program does provide the educational equivalent of an economy of scale so that we can offer a range of educational experiences sufficient to ensure that students have access to the range of viewpoints and research directions in psycholegal studies. Besides offering a uniquely diverse array of psycholegal courses, the Nebraska Program sponsors a special colloquium series and frequent invited symposia and institutes. The Nebraska Program also serves as the hub of the Consortium on Children, Families, and the Law, which enables students to work with leading interdisciplinary scholars at the Universities of Hawaii, Iowa, Michigan, Pittsburgh, and Virginia, the State University of New York, and various non-university-based centers (e.g., the Center on Children and the Law of the American Bar Association). Combining those opportunities with travel to various national professional meetings, students meet and hear most of the leading scholars in psychology and law.

The Nebraska Program also is sufficiently large to form a "critical mass" of colleagues that facilitates students' identification as "law/psych" scholars. See, e.g., Otto, Heilbrun & Grisso, *Training and Credentialing in Forensic Psychology*, 8 BEHAV. SCI. & L. 217 (1990), in which a former postdoctoral fellow in the Nebraska Program described "the most valuable part of the program to be involvement with a large number of individuals (fellows, graduate students, law faculty, psychology faculty) with interests in the forensic area. Such an environment certainly fosters specialized study, research, and collaboration." *Id.* at 224.

7. In part as a result of our continuing efforts to evaluate and refine various aspects of our training program, faculty and graduates of the Nebraska Program have written numerous analyses of critical elements in training on various aspects of psycholegal studies. See G. MELTON, L. WEITHORN & C. SLOBOGIN, COMMUNITY MENTAL HEALTH CENTERS AND THE COURTS AN EVALUATION OF COMMUNITY-BASED FORENSIC SERVICES (1985)(evaluation of training for community mental health professionals in forensic mental health services); Hafemeister, Ogloff & Small, *Training and Careers in Law and Psychology: The Perspective of Students and Graduates of Dual Degree Programs*, 8 BEHAV. SCI. & L. 263 (1990); Levine, Wilson & Sales, *An Exploratory Assessment of APA Internships with Legal/Forensic Experiences*, 11 PROF. PSYCHOLOGY 64 (1980); Melton, *Training in Psychology and Law*, in HANDBOOK OF FORENSIC PSYCHOLOGY 681 (I. Weiner & A. Hess eds. 1987); Melton, Monahan & Saks, *Psychologists as Law Professors*, 42 AM. PSYCHOLOGIST 502 (1987); Otto, Heilbrun & Grisso, *supra* note 6; Tomkins & Ogloff, *Training and Career Options in Psychology and Law*, 8 BEHAV. SCI. & L. 205 (1990). For a comprehensive discussion of the curriculum, see G. Melton, *Training in Mental Health Policy* (Sept. 6, 1990)(application to the National Institute of Mental Health for competing continuation funding of the Program).

both the College of Law and the Department of Psychology have a tradition of problem-centered scholarship and training responsive to state and national needs and relatively unconstrained by disciplinary and subdisciplinary boundaries.⁸

It is not clear that the development of psychology and law at Nebraska has been linear; one phase has not obviously evolved into another, and the stream of development has been more intermittent than continuous, at least when that process is examined across decades. Nonetheless, that Nebraska has been a site of innovation in psycholegal and sociolegal studies since the earliest days of such work suggests an ongoing receptivity to interdisciplinary scholarship in the public interest.⁹

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8. The Department of Psychology at Nebraska, which celebrated its centennial last year, is one of the oldest departments in the United States, and it contributed heavily to the development of the discipline in the late 19th and early 20th centuries. See Benjamin, *A Teacher is Forever: The Legacy of Harry Kirke Wolfe (1858-1918)*, 14 TEACHING OF PSYCHOLOGY 68 (1987); Benjamin & Bertelson, *The Early Nebraska Psychology Laboratory, 1889-1930: Nursery for Presidents of the American Psychological Association*, 11 J. HIST. BEHAV. SCI. 142 (1975).

In the past two decades, the department has fostered innovative programs for graduate education not only in psycholegal studies but also on other topics of social concern that cross disciplines and subdisciplines of psychology, such as alcoholism, behavior toxicology, and rural mental health. See, e.g., Hargrove, *Training for Rural Mental Health Service Delivery: A Report from Nebraska*, — COMMUNITY MENT. HEALTH J. — (forthcoming); Hargrove, Fox & Goldman, *Recruitment, Motivation, and Reinforcement of Preprofessionals for Public Sector Mental Health Careers*, — COMMUNITY MENT. HEALTH J. — (forthcoming); Hargrove & Howe, *Training in Rural Mental Health Delivery: A Response to Prioritized Needs*, 12 PROF. PSYCHOLOGY 722 (1981); Hargrove & Spaulding, *Training Psychologists for Work with the Chronically Mentally Ill*, 24 COMMUNITY MENT. HEALTH J. 283 (1988); Howe, *Ph.D. Psychology Training for Rural Mental Health: The University of Nebraska-Lincoln Program*, in TRAINING PROFESSIONALS FOR RURAL MENTAL HEALTH 90 (H. Dengerink & H. Cross eds. 1982); Rivers & Cole, *The Alcohol Training Speciality in Community-Clinical Psychology*, 7 PROF. PSYCHOLOGY 202 (1976).

9. One of the remarkable aspects of legal education has been that, although there have been ebbs and flows in interdisciplinary emphasis in the field as a whole, there has been substantial consistency in the law schools that have tended to lean toward an identity as academic institute more than professional school and, even more specifically, toward openness to academic study of the law from the perspective of multiple disciplines. See R. STEVENS, *LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); Melton, Monahan & Saks, *supra* note 7; Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979). Although the factors that maintain such traditions are not clear, it is unlikely that they are purely random.

Sociohistorical analysis of such issues might provide some clarifications that would prevent the necessity of seemingly perpetual debate over the place of the arts and sciences in the law curriculum; see R. STEVENS, *supra*; Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968). In legal academia in the 1980s, the brouhaha over the suggestions by Harvard President and former Law Dean Derek Bok that law schools should emphasize empirical study of the legal system was clearly reminiscent of the debates within the facul-

B. Sociological Jurisprudence

The beginning of law and social science at Nebraska—and, for that matter, in legal academia as a whole, to a large extent—must begin with Roscoe Pound. Although much of his most important work on *sociological jurisprudence* was conducted after he departed Nebraska for Harvard, Dean Pound surely serves as patron saint for psycholegal and sociolegal studies at Nebraska. He laid the foundation for much of the “law and. . .” scholarship that has been commonplace in legal academia in the past two decades. In effect, Pound sought to humanize the law—to move the law beyond a “mechanical jurisprudence”¹⁰ to a greater sensitivity to the human dilemmas that the law is intended to address. Pound’s own summary of the central problem of sociological jurisprudence was “to enable and to compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account, of the social facts upon which law must proceed and to which it must be applied.”¹¹

In admonitions that unfortunately still have much to say to some jurists, Pound sought to destroy the legal fictions that are used to rationalize unjust social ordering.¹² He based his jurisprudence on a progressive view of law as a “social institution which may be improved by intelligent human effort” and a normative view that judges and legal scholars have a “duty to discover the best means of furthering and directing such effort” in the service of “the social purposes which law

ties of major law schools in the realist era. See Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

10. Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462 (1909).

11. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 512-13 (1912).

12. In his critique of realist jurisprudence, Pound began by acknowledging the significance of realism as “fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be, or as one feels they ought to be” and as “faithful adherence to the actualities of the legal order as the basis of a science of law.” Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697 (1931).

As I have noted elsewhere, an unfortunate tendency by some jurists even today is to justify limitations on rights of disadvantaged groups by behavioral assumptions derived from ideology about the way that the social order ought to be, without regard to contrary empirical evidence. See, e.g., Melton, *The Clashing of Symbols: Prelude to Child and Family Policy*, 42 AM. PSYCHOLOGIST 345 (1987). In a manner reminiscent of the institutionalized unreality that the sociological jurisprudes and the realists criticized nearly a century ago, such myths can assume a life of their own through the application of the principle of stare decisis to the erroneous assumptions themselves. See Perry & Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633 (1984). Cf. Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986) (arguing that judicial findings about social reality should be treated like law for purposes of introduction of social science research, review by appellate courts, and consideration by subsequent and inferior courts).

subverses.”¹³ Empirical observation (e.g., scholarship on factors affecting judicial decision making) was perceived as neither a goal in itself nor merely a means of debunking the law. Rather, it was viewed by Pound as a tool for promoting social welfare¹⁴ through discovery of values particularly important for the law to protect¹⁵ and experimentation to identify ways that the law might more fully achieve its purposes.¹⁶

C. Experimental Jurisprudence

Although Pound's work is classic, Nebraska has had other interdisciplinary forays that are less well known. Notably, sociological jurisprudence served as the foundation for a brief but far-reaching embrace of *experimental jurisprudence*, a jurisprudential approach championed by Frederick Beutel,¹⁷ who served as dean when the College of Law reopened after World War II. Dean Beutel perceived the quality of legal scholarship to be determinable by “a pragmatic test of their actual workings in everyday life,” without regard to underlying philosophy.¹⁸ Consistent with that view, Beutel regarded every legal decision to be an experiment “where the methods of trial and error must prevail.”¹⁹ Moreover, to maximize the likelihood of a practical success, Beutel believed that social scientific methods should predominate in legal inquiry.²⁰

In keeping with Beutel's ideas about the proper role of the law in society, the entire curriculum of the College of Law was reshaped to increase students' appreciation of the utility of empirical analyses of

13. Pound, *supra* note 11, at 516.

14. In a passage prescient of current critiques of the law and economics movement, see Melton, *Law, Science, and Humanity: The Normative Foundation of Social Science in Law*, 14 LAW & HUM. BEHAV. 315 (1990), Pound criticized some branches of the realist movement for espousing “the entrepreneur attitude toward law” and seemingly promoting the interests of business without regard to their relation to the broader social welfare. Pound, *supra* note 12, at 708.

15. Pound argued that realism should include “[a] theory of interests [and a parallel theory of values] and of the ends of the legal order based on or consistent with modern psychology.” Pound, *supra* note 12, at 711. He believed that psychology, then in its infancy, would illuminate the way that values develop in a culture and are expressed through law. Pound, *supra* note 11, at 503-09.

16. Pound, *supra* note 11, at 515.

17. See F. BEUTEL, *DEMOCRACY OR THE SCIENTIFIC METHOD IN LAW AND POLICY MAKING* (1965); F. BEUTEL, *EXPERIMENTAL JURISPRUDENCE AND THE SCIENSTATE* (1975) [hereinafter F. BEUTEL, *SCIENSTATE*]; Beutel, *Some Implications of Experimental Jurisprudence*, 48 HARV. L. REV. 169 (1934) [hereinafter Beutel, *Some Implications*].

18. Beutel, *Some Implications*, *supra* note 17, at 178.

19. *Id.*

20. See, e.g., *id.* at 195-97.

the social consequences of legal decisions.²¹ Although Nebraska ultimately returned to a traditional curriculum, contemporary analysis of legal education described the postwar Nebraska curriculum as "extending . . . well beyond that of any other school" in its attention to "problems of the body politic."²²

Beutel extended the work of the realists and the sociological jurists in two ways. First, he recognized the importance of modern social science methodology as a means for fulfillment of the desire for knowledge about the actual effects of the law and the legal system. The "social engineering" that Pound and others espoused early in the century really was more social work than social science. The sociological jurists were concerned with the general goal of fitting law to social reality, but, as was understandable given the infancy of the social sciences, they gave relatively little scrutiny to the methodological problems in doing so. Although Beutel was not as skeptical as he should have been about the limits of scientific inquiry, he did pioneer a recognition of the significance of the adoption of experimental methods in the social sciences as applied to law.²³

Second, Beutel defined post-New Deal areas of law that benefit from a social-scientific analysis. By the time that he assumed the Nebraska deanship, realism had waned as an independent force in legal scholarship. Although the reasons for the decline were multiple,²⁴ at least one was that most of the movement's goals had been achieved. The notion that judges are influenced by social and political reality had become so well accepted as to be trivial, and the New Deal ideals that guided the realists had been reified in a vast program of social welfare legislation.²⁵ Beutel followed that development to what may have been its logical conclusion: an emphasis on the application of scientific methods in the development and implementation of legislation and regulations.²⁶

21. See Beutel, *The New Curriculum at the University of Nebraska College of Law*, 25 NEB. L. REV. 177 (1946).

22. E. BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* 217 (1948). For a detailed account of the evolution of legal education in response to sociological-jurisprudential and realist developments, see R. STEVENS, *supra* note 9.

23. See, e.g., F. BEUTEL, *SCIENSTATE*, *supra* note 17, at 68-69.

24. J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 21, 27 (2d ed. 1990).

25. The sociological jurisprudence and realist movements were heavily entwined with Progressivism and the New Deal, respectively. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). Law school curricula were permanently altered to take into account the new realms of public law, and some of the faculty teaching the new courses had been instrumental in drafting and implementing the legislation that was the foci of such courses. R. STEVENS, *supra* note 9, at 159-60.

26. F. BEUTEL, *SCIENSTATE*, *supra* note 17, at 278-361. Beutel's emphasis on public

Despite these contributions, Beutel's influence was short-lived, apparently because of his dogmatic approach to science and law.²⁷ Beutel failed to appreciate—and even exaggerated—the realists' confusion of *ought* and *is* and their lack of care in analysis of the moral underpinnings of the law. He believed that problems of values are unimportant,²⁸ and he failed to recognize that his own "scientific" conclusions often were themselves normative rather than empirical.²⁹ He also rejected traditional values out of hand without examination of their merit.³⁰ In short, Beutel sought to elevate the scientific method as the end rather than a means, and to strip the law of any meaning beyond its effect.³¹

law was reflected in his reform of the Nebraska law curriculum. Beutel, *supra* note 21.

Perhaps ironically, current social science in law has moved away from the emphasis on administrative process to a concern with judicial assumptions in constitutional law and in interpretation of related statutory developments (e.g., civil rights statutes). See generally J. MONAHAN & L. WALKER, *supra* note 24.

27. F. BEUTEL, *SCIENSTATE*, *supra* note 17, begins with an apparently bitter but telling self-appraisal by Beutel:

Because this book deprecates the place of religion, the common law, and democracy (the "sacred cows" of Anglo-American polity) in the proper structure of government, and since it reduces political ideals (values) to their rightful place as unproven hypotheses, it was impossible to get it sponsored in the United States either by endowed university presses or by commercial publishers. It has therefore been necessary to have it published in Germany where the intellectual climate is more favorable to the growth of science.

Id. at 10.

28. See, e.g., Beutel, *Some Implications*, *supra* note 17, at 179 ("The ethical problem of what is the ultimate good, although it may eventually become one of the problems of jurisprudence, is today too far removed to require consideration").
29. See, e.g., *id.* at 191 ("Any legal system which places over ninety per cent of the world's goods in the hands of less than thirteen per cent of the population of a new country, without regard to intelligence, ability, or social benefits to be derived therefrom, and which requires the destruction of materials for food and clothing when seventy-five per cent of the population is living below a decent standard of comfort, has little to recommend it to the scientific jurist") (footnotes omitted).
30. See, e.g., *id.* at 185 ("Scientific jurisprudence can have little to say for constitutions; like codes, they are an attempt of the dead past to bind the future"). With a footnote arguing for eugenic measures to prevent the reproduction of the "lower classes" at a rate much more rapid than the "more intelligent," Beutel urged outright rejection of "old-fashioned morality":

As long as these [legal] ideals are based upon tradition, folk lore of former generations, religion, mysticism, and even blind prejudice, they cannot be trusted as a basis for law. Laws growing out of such ideals are likely to run counter to new developments in science which are creating profound changes in the social structure. Statutes or judgments enacting the morals of yesterday may encourage or force anti-social practices today which threaten the welfare of the race of tomorrow.

Id. at 189 (footnotes omitted).

31. See, e.g., *id.* at 181 ("A scientific jurisprudence would demand that the bandage be

D. Social Science in Law

Although Beutel's work was not sufficiently influential to characterize his approach as underlying a "movement," the Nebraska flirtation with experimental jurisprudence was one of the few systematic efforts to integrate law and social science during the postwar period. As law schools gathered funds to educate returning military veterans to be legal practitioners, empirical research was not a high priority.³²

Social science began to make its way back into law schools in the 1960s with the demand for "relevancy" in the curriculum. Somewhat curiously, though, the response—what is often termed the *law and society* movement³³—was minimally applied, perhaps because the standard for relevancy was necessarily outside the law itself. Developing coincident with a myriad of other interdisciplinary ("law and . . .") efforts initiated in the 1960s and 1970s,³⁴ the law and society movement (institutionalized in the Law and Society Association) has been disproportionately led by law professors (rather than sociologists, anthropologists, or political scientists), who typically have taken the perspective of outsiders looking in. Accordingly, they have used social-scientific rather than legal theories to frame research questions, and they have examined the legal system as social scientists might study any other institution.³⁵

stripped from the eyes of the courts, and that they be supplied with a complete staff of research experts to enlighten them on the real interests involved.") and 187 ("It is not surprising that in the eyes of many scientists the art of the legal profession today rises little higher than that of the osteopath, the astrologer, the hypnotist, or phrenologist, and that the wise business man stays as far as possible from the judicial process").

32. See J. MONAHAN & L. WALKER, *supra* note 24.

33. See Friedman, *The Future of Law and Social Sciences Research*, 52 N.C.L. REV. 1068 (1974); Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986).

34. An interesting view of these developments was offered by Richard Posner in a sometimes acerbic Article in the centennial issue of the *Harvard Law Review*. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). Of course, Judge Posner is widely known for his devotion to the most influential of the recent "law and . . ." movements—*law and economics*. See, e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* (2d ed. 1983). In that regard, he has tested interdisciplinary efforts for their utility in legal decision making, an approach similar in method if not necessarily in ideology to the perspective taken by participants in the social science in law movement. Posner also has taken a stance similar to that of the older law and society movement, though, in another of his prolific forays into interdisciplinary scholarship. In his work on *law and literature*, Posner has exhibited a rich interest in purely academic study of the law, with only tangential concern for applied benefit (in application of literary methods to analysis of the meaning of legal texts). See, e.g., R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

35. Followers of the law and society movement generally have denigrated the significance of the behavioral issues in the law in favor of basic scholarship on the nature of law, apart from the law's own need for social-science knowledge. Malcolm

In its purest form, the law and society approach is basic social science; the law is merely a new laboratory for the investigation of social theory. Even when they have interests that are applied, law and society scholars generally disregard the doctrinal premises on which the law is founded. Rather, they test the congruence of the law in action with theories of social action derived in other spheres.

By contrast, most well formulated psycholegal studies—certainly most of those conducted at Nebraska³⁶—have been explicitly applied endeavors that have been framed in the perspective of the law; such work is *social science in law*. As I have summarized elsewhere:

the social science in law (SSL) perspective has been the product primarily of social scientists in law schools—in a sense, outsiders on the inside of legal academia. More precisely, the articulation of SSL has been the product of such scholars. As a practical matter, SSL has grown truly outside the legal system in the laboratories of social scientists who have sought to test the behavioral and social assumptions that underlie the formulation or application of legal doctrine. To do their work, such scientists necessarily have taken an insider's perspective to discover the empirical issues that are critical to legal policy.

Consistent with that approach, most theoretical scholarship in SSL has been aimed at identifying social-scientific questions in the law and determining the most effective means of presenting the relevant research findings to legal decision makers. To a large extent, "most effective" has been conceptualized pragmatically as the means most consonant with accepted principles of the law of evidence and procedure.³⁷

Feely, director of the Center for the Study of Law and Society at the University of California, Berkeley, has provided a particularly frank statement of a lack of concern with the psychosocial problems posed by the law itself:

Like the family, religion, the market, and politics, law is an ubiquitous institution, found everywhere through time and across all cultures. As one of the great forms of social ordering, it is worthy of study in the same ways these other great institutions are. Its universality, its appeal, its endurance all serve to make it an important subject in a liberal arts curriculum dedicated to exploring humankind's enduring institutions.

By this I do not mean to suggest that the law is the crowning glory of civilization which must be celebrated uncritically. Rather I believe that law, as a universal form of social ordering, merits a prominent place in the liberal arts curriculum. *Law is too important a cultural institution to be left to the law schools*, whose goals are professional training rather than cultural understanding.

Feely, *Featuring Law in the Liberal Arts Curriculum*, 5 FOCUS ON L. STUD. 1, 1 (1990)(emphasis added).

36. Most psycholegal research at Nebraska has been focused on behavioral assumptions in the law or on the use of social science in the law. See *infra* § II and Appendixes A and B.
37. Melton, *Law, Science, and Humanity: The Normative Foundation of Social Science in Law*, 14 LAW & HUM. BEHAV. 315, 320 (1990)(citations omitted). The social science in law perspective has been articulated most comprehensively by Professors John Monahan, a legally sophisticated psychologist, and Laurens Walker, a psychologically sophisticated lawyer, of the University of Virginia School of Law, in a casebook, J. MONAHAN & L. WALKER, *supra* note 24, and a trilogy of important articles on various types of social science evidence, Monahan

Because SSL scholarship has been so clearly applied in its focus, its underlying philosophy has not been well developed. I have argued, however, that

SSL is based on a coherent moral vision that is consonant with its realist heritage but that also draws on the deontological underpinnings of postrealist legal philosophy Like their realist progenitors, SSL scholars appear to share a commitment to the promotion of social welfare and beliefs that the law is a useful means to that goal, that the law is reformable, and that social science can assist the law in its mission.³⁸

SSL scholarship extends realist contributions by application of better developed social science methods in the context of case law and legal scholarship that is respectful of fundamental moral values (*e.g.*, autonomy, privacy, and equality).³⁹

E. Psychological Jurisprudence

In recent years, psycholegal scholars at Nebraska have begun to build on the foundation provided by an SSL approach to establish a *psychological jurisprudence*.⁴⁰ The assumption underlying such work

& Walker, *supra* note 12; Walker & Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988); Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). The arguments presented in these works were summarized succinctly in Monahan & Walker, *Social Science Research in Law: The Arguments Presented A New Paradigm*, 43 AM. PSYCHOLOGIST 465 (1988). See also W. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS* (1984) (casebook examining use of social science in law); Melton, Monahan & Saks, *supra* note 7, at 502 (discussion of the expanding role of psychologists in law as a result of change in the jurisprudential foundation of their work).

38. Melton, *supra* note 37, at 321 (citation omitted).

39. *Id.* at 321-22.

40. Several of my own articles have served as initial explorations of psychological jurisprudence. *E.g.*, Melton, *supra* note 37; Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146 (1989); Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851 (1988) [hereinafter Melton, *Significance*]; Melton & Saks, *The Law as an Instrument of Socialization and Social Structure*, in 33 NEB. SYMP. ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT 235 (1985). A recent doctoral dissertation in the Nebraska Program applied the perspective to an empirical and conceptual analysis of the nature of privacy interests. M. Small, *The Role of Perceptions of Privacy in a Psychology of Jurisprudence* (1990). See also Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293 (1988); Tremper & Kelly, *The Mental Health Rationale for Policies Fostering Minors' Autonomy*, 10 INT'L J. L. & PSYCHIATRY 111 (1987) (articles by then-faculty member in the Nebraska Program showing the psychological significance of legal protection of human dignity in childhood and adolescence).

The significance of a psychological-jurisprudential perspective was examined—not always with complete favor—in a symposium at the meeting of the APA in Boston in August 1990. All of the participants had connections with the Nebraska Program. D. Fox, *The Autonomy-Community Balance and the Equity-Law Distinction* (former postdoctoral fellow in the Program); M. Small, *The Need for a Psychology of Jurisprudence* (recent graduate of the J.D.-Ph.D. pro-

has been that the best (*i.e.*, most useful) psycholegal research is that which informs legal policymakers about behavioral questions that are relevant to the application of fundamental values.

This perspective has been enhanced by analysis of the contributions that psychology might make in the resolution of classical jurisprudential problems. Specifically, Professor Saks and I urged that studies be undertaken to determine what the law means subjectively, how that meaning is acquired, and how the law shapes the behavior of individuals, groups, and communities.⁴¹ In other words, a psychology of jurisprudence would describe and explain the phenomenology of law, socialization into the law, and socialization by the law. Insofar as the behavioral effects of the law are symbolic,⁴² there is a delicate interplay among these topics; the law both reflects and sustains the norms of the community. Therefore, the law should "work" best when positive and intuitive law are congruent.

These observations about the psychology of law suggested the utility of a psychological jurisprudence. Psychology may illuminate the nature of law by identifying, for example, the relationship between legal events and perceived justice. More profoundly, psychology may indicate the conditions most conducive to development and preservation of human dignity and the values related to it.⁴³ Similarly, by clarifying the variables that affect legal socialization, psychology may assist legal policymakers to develop settings and promote policies that enhance the development of democratic values.

Put into such a framework, SSL scholars' tests of the behavioral assumptions in the law can be understood as one element of a broader

gram); J. Snowden, *The Greedy and the Not-So-Greedy: Tribal Law* (faculty colleague at Nebraska); R. Wiener, *Psycholegal Jurisprudence: The Foundation of an Emerging Paradigm* (former postdoctoral fellow in the Program and recipient of M.L.S. degree from Nebraska). Professor Saks and I served as discussants. The papers from the APA symposium are being developed into a special issue of *Behavioral Science and the Law*.

41. Melton & Saks, *supra* note 40, at 268.

42. We argued that the law's most acute effects on behavior occur through its function as a moral educator. *Id.* at 251-63. The law is a system of social cues that guide the behavior of those who are motivated to adhere to community norms—most people—irrespective of the carrots or sticks that the law promises to provide: "Law teaches the moral and social norms of the community and, in a sense, announces, reiterates, and indeed ritualizes the myths and themes of the culture." *Id.* at 251.

43. Psychological jurisprudence views the promotion of human dignity as the actual primary goal of the law and the goal that the law *should* have, and it posits empirical psychological study as the optimal method of illuminating the conditions that are conducive to a sense of dignity. This constellation is analogous to the mixture of empirical, normative, and methodological attention to promotion of efficiency (maximization of wealth) embedded in legal economics. I have little doubt of the greater nobility of the psychological as compared to the economic perspective in regard to their organizing principles. *See generally* Melton, *supra* note 37.

mission of "assist[ance] in the fulfillment of the values fundamental in Western law and moral philosophy by identifying basic human concerns and testing the assumptions that limit the application of historic legal principles."⁴⁴ Through continual evaluations of the behavioral assumptions (*i.e.*, statements of legislative intent in the exercise of state interests, whether by legislators or judges) that might limit personhood and the rights corollary to it, psycholegal scholars "can expose myths that falsify . . . experience . . . and provide ruses for protection of a social order inconsistent with legal ideals."⁴⁵ Such inquiry should result in increased attention by the law to the most significant aspects of our lives (both subjectively and normatively) as individuals and members of families and communities, illumination of unjustified limitations on fundamental rights, and identification of effective means of vindicating such rights.⁴⁶ At the same time, psychological jurisprudence should drive psychology itself toward greater consideration of the most fundamental aspects of human experience—greater realism in psychological study and greater humanism in law.⁴⁷

II. THE IMPACT OF THE NEBRASKA PROGRAM

As the review thus far illustrates, the jurisprudential theories underlying psycholegal scholarship have moved toward increasingly fundamental concerns in the law. Unfortunately, psycholegal research itself often has not been so sensitive to the psychological questions in the law. Rather than starting with an analysis of the behavioral assumptions in the law, psychologists too often have attempted to increase the social relevance of their work by redefining traditional lines of psychological research as "legal." Therefore, psycholegal research often has seemed to be intended to illuminate merely the psychology of juries (small groups) and eyewitnesses (perception and memory).⁴⁸ To compound the folly, such research often has seemed to lack the

44. *Id.* at 322.

45. *Id.* This concern is remarkably similar to that voiced by Pound three-quarters of a century ago. See *supra* note 12.

46. Melton, *supra* note 37, at 329.

47. The perspective that I have advocated is "bottom-up." From such a perspective, domains of law are defined as citizens in various social contexts perceive them, and the focus of analysis is everyday experience. See, *e.g.*, Melton, *Significance*, *supra* note 40. For jurisprudential analyses undertaken from vantage points similar to my own, see T. DAHL, *WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE* (R. Craig trans. 1987); Nader, *A User Theory of Legal Change as Applied to Gender*, in 33 NEB. SYMP. ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT (G. Melton ed. 1985).

48. The narrowness of much psycholegal research was graphically illustrated by an examination of submissions to *Law and Human Behavior*, the leading journal in the field. Saks, *The Law Does Not Live by Eyewitness Testimony Alone*, 10 LAW & HUM. BEHAV. 279 (1986).

most fundamental accommodations to external validity.⁴⁹

Since its inception, researchers in the Nebraska Program have been committed to development of an empirical knowledge base relevant to important questions of legal policy. Examination of the topics of doctoral dissertations that have been written by graduates of the Nebraska Program (Appendix B) and of recent scholarship discussed at professional meetings (e.g., Appendix A) shows little of the triviality of focus that has been common within the field of psychology and law; eyewitness testimony and jury research are largely absent. Rather, the research conducted by students in the Nebraska Program generally has been one of three types: assessment of the impact of legal reform (essentially, examining whether the goals of legislators and litigators have been fulfilled); evaluation of behavioral assumptions in the law; or determination of the factors affecting use of social science in law. Most of the recent research has been within the latter two categories. In short, contemporary psycholegal research at Nebraska is similar in content to the agenda that Pound established early in the century for sociological jurisprudence: to discover "the actual social effects of legal institutions and legal doctrines,"⁵⁰ to determine "means of making legal rules effective,"⁵¹ and to develop an approach

49. In social science jargon, *external validity* refers to the generalizability of research findings to the real world. *Internal validity* refers to the degree that alternative explanations for findings are ruled out by the research design. See generally T. COOK & D. CAMPBELL, *QUASI-EXPERIMENTATION: DESIGN AND ANALYSIS ISSUES FOR FIELD SETTINGS* (1979).

Psycholegal research has been criticized with some justification for failing to preserve even the rudiments of the legal process in research that is supposed to, for example, simulate the trial process. Konečni & Ebbesen, *External Validity of Research in Legal Psychology*, 3 LAW & HUM. BEHAV. 39 (1979). Criticism of the choice of research topics on the ground of legal triviality, see J. MONAHAN & L. WALKER, *supra* note 24, is in the same genre.

Although some criticism of the external validity of psycholegal research clearly is justified, it is important also to note that even in the "overresearched" areas of eyewitness and jury research, the external validity of research has increased dramatically in recent years. See generally V. HANS & N. VIDMAR, *JUDGING THE JURY* (1986); S. KASSIN & L. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988). For example, in our own research on the effects of adding a guilty but mentally ill ("GBMI") option in insanity cases, the stimulus is a videotaped professional reenactment of an actual trial with the full panoply of instructions. Mock jurors are chosen from the jury pool, and they have the opportunity to see the videotape and then to deliberate in realistic mock-courthouse settings. (Martin Gardner, Daniel Wolfe, and Ruthann Macolini have collaborated with me in the GBMI study, which has been supported by a grant from the National Institute of Mental Health.)

In that context, some jurists have established standards for use of social science research that belie a desire to ignore social reality more than to exercise due care in consideration of social-scientific evidence. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Lockhart v. McCree*, 476 U.S. 162 (1986).

50. Pound, *supra* note 11, at 513.

51. *Id.* at 514.

to legal decision making that will result in "reasonable and just solutions of individual causes."⁵²

The Nebraska Program has been typified not only by careful interdisciplinary scholarship on topics of legal significance but also by equal care in the diffusion of behavioral science research and theory among policymakers. Faculty members in the Nebraska Program frequently provide briefings to Congressional staff, consult to administrators and legislators in state governments around the country, serve on task forces of relevant professional organizations, provide expert testimony, prepare amicus briefs, and provide background information for mass media and community groups. To facilitate such interaction and to ensure that the form and forum for communication of psycholegal research are optimal for such interaction, faculty members in the Nebraska Program have studied the process of knowledge diffusion in the legal system,⁵³ and they use that information for systematic application of research within various groups of legal policymakers and practitioners.

Consistent with the philosophy of the Nebraska Program and the education that takes place in both the generation and diffusion of legally relevant, socially significant research, most graduates of the Nebraska Program work in settings that are conducive to such efforts (see Table 1). Besides accumulating impressive records of scholarship while in graduate and law school, most graduates have been successful in interdisciplinary work. Many are in public service, and still more are in academia. Of those in academia, though, most are in interdisciplinary programs where their work continues to be psycholegal in content, to focus on problems of substantial legal and social significance, and to involve active dissemination and leadership efforts.

TABLE 1
EMPLOYMENT OF GRADUATES OF THE LAW/
PSYCHOLOGY PROGRAM^a

Place of Employment	Track ^b			Total
	J.D.-Ph.D.	Ph.D.-M.L.S.	J.D.-M.A.	
Academia ^c	6	10	5	21
Private research centers	3	0	1	4
Public service ^d	7	4	2	13
Private practice ^e	3	0	5	8
Total	19	14	13	46 ^f

^aThis table includes "all-but-dissertation" students who have full-time professional employment.

52. *Id.* at 515.

53. See, e.g., REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH (G. Melton ed. 1987); Melton, *Bringing Psychology to the Legal System: Opportunities, Obstacles, and Efficacy*, 42 AM. PSYCHOLOGIST 488 (1987).

^b Students and fellows who completed the equivalent of the M.L.S. degree (generally before that degree became available) are listed within the "Ph.D.-M.L.S." track. Analogously, lawyers who were postdoctoral fellows within the Program before the Psychology Department began awarding an M.A. for their work are counted as "J.D.-M.A." graduates.

Some graduates of the J.D.-M.A. program entered the Law/Psychology Program with the intention of earning a Ph.D. degree, but they elected instead to obtain a terminal M.A.

^c All but five of these graduates are in interdisciplinary departments or centers or in joint appointments. Most of the remaining graduates (two J.D.-Ph.D.s and two Ph.D.-M.L.S.s) have sole appointments in psychology departments, but all do interdisciplinary teaching. One graduate (a J.D.-Ph.D.) is a law professor.

^d Several graduates now working in other settings formerly were employed as clerks or staff in courts or legislatures. Two J.D.-Ph.D.s and three J.D.-M.A.s were clerks to appellate judges. Two J.D.-Ph.D.s were congressional fellows, and one former post-Ph.D. fellow was a staff member in the Oklahoma legislature. Two other graduates (a J.D.-M.A. and a J.D.-Ph.D. student who is working on his dissertation) are now employed as staff in the Nebraska legislature and are counted in this row.

Other settings in which graduates currently are public servants include the Civil Rights Division of the U. S. Justice Department (one J.D.-Ph.D.), a protection and advocacy agency for people with mental disabilities (one J.D.-Ph.D.), a state court administrator's office (one J.D.-Ph.D.), court clinics (one J.D.-Ph.D. and one Ph.D.-M.L.S.), mental health/mental retardation/substance abuse planning offices (two J.D.-Ph.D.s and one J.D.-M.A.), a correctional mental health unit (one Ph.D.-M.L.S.), a domestic violence program (one Ph.D.-M.L.S.), and a Veterans Administration hospital (one Ph.D.-M.L.S.). Several of these positions (those in planning offices and the court administrator's office) have applied research (generally a mixture of empirical and legal research) as their primary function.

^e One J.D.-Ph.D.'s practice is predominantly in clinical psychology, although with an emphasis on consultation to attorneys. The remaining graduates in private practice are in medium- or large-firm law practice.

^f Two graduates are not included in this table. One recent graduate who recently completed a judicial clerkship (a J.D.-M.A.) has not yet accepted a permanent position. Another graduate (a J.D.-Ph.D.) is deceased. Therefore, the correct *N* for graduates and "almost graduates" of the Law/Psychology Program is 48.

III. THIS SYMPOSIUM IN JURISPRUDENTIAL CONTEXT

This Symposium is a fitting complement to the achievements of the Nebraska Program's faculty, students, and graduates. For the most part, the Articles in this issue of the Symposium fit well within the evolving tradition of psycholegal scholarship. Although several of the Articles challenge prevailing behavioral assumptions in the law, those challenges are in the service of the law's own stated purposes. As a group, they demonstrate a sensitivity to the potential of the law in building and reflecting a sense of community and in protecting human dignity, and they offer often elegant examples of the potential value of psychological inquiry in fulfilling that potential.

Moreover, the breadth of topics examined illustrates the wide range of legal issues involving behavioral assumptions, even if psychologists of law themselves often have been slow to move beyond traditional psycholegal topics related to the criminal justice and

mental health systems. As such, this Symposium may stand as a turning point in the development of psycholegal studies.

Two of the Articles in the Symposium—both on non-traditional topics—are creative applications of a psychological-jurisprudential framework, in which subjective understanding of legal constructs is used to guide the development of the law. Moving adroitly into an area of law that psychologists have largely ignored, Valerie Hans shows how intuitive views of morality can serve as a foundation for defining legal standards relating to corporate responsibility.⁵⁴ Richard Wiener, a former postdoctoral fellow in the Nebraska Program, applies a similar analysis to the role of the law as a moral educator in a domain (medical malpractice) in which symbolic effects of law seldom have been considered.⁵⁵ Starting from an assumption that the law serves in part to educate the community about prevailing social norms, Professor Wiener examines the potential of malpractice law in promoting individual cognitive representations of standards of practice and, in so doing, inculcating desired norms of professional behavior. Besides applying contemporary psycholegal analysis, Wiener also follows a more traditional approach in realist and post-realist jurisprudence by demonstrating the potential benefit of scientific methods in increasing the efficiency of the law in pursuit of its goals.

Michael Perlin's Article parallels that of Wiener in showing the influence of the "cognitive revolution" in psychology.⁵⁶ Professor Perlin offers a rich integration of cognitive and social psychology in an attempt to understand the factors affecting mental health law. His work fits within the continuing tradition in law and social science of study of the behavior of judges and other legal decision makers, including the electorate, as an effort to describe the law in action, apart from the abstract principles on the books.⁵⁷ Perlin sheds particular light on the psychological forces that may push jurists toward "irra-

54. Hans, *Attitudes Toward Corporate Responsibility: A Psycholegal Perspective*, 69 NEB. L. REV. 158 (1990).

55. Wiener, *A Psycholegal and Empirical Approach to the Medical Standard of Care*, 69 NEB. L. REV. 112 (1990).

56. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3 (1990).

57. The discrepancy between legal principles and legal action was an important early insight of Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), that became a core idea in realist jurisprudence. See, e.g., Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 580 (1932) ("The human element in the administration of justice by judges is irrepressible") (emphasis in the original). More recently, analysis of judicial behavior has been a key feature of economic positivism. See, e.g., W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (the fundamental thesis of economic positivism is that "the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation").

tional" decisions based on social assumptions directly contrary to empirical research on the insanity defense. In that regard, Perlin's analysis of the problems that arise for the law when legal standards do not comport with common moral intuition suggests a useful new direction for psychological-jurisprudential research.

Perlin's work most closely tracks the historic approach of Jerome Frank.⁵⁸ Perlin goes well beyond the insights of Judge Frank, though, with careful application of systematic empirical research (instead of armchair psychoanalysis of judges). In that regard, Perlin's choice of term ("psychodynamic") to describe his analysis of the role of ordinary common sense in legal decision making is unfortunate, because it implies psychoanalytic underpinnings that are at most tangential to the cognitive research that serves as the primary foundation for his scholarship.

Perlin's work is also well within the social science in law perspective in its acceptance of overarching legal norms (e.g., respect for personal dignity) but its challenge of their application on empirical grounds. In that regard, Alexander Tanford's work⁵⁹ parallels Perlin's in tone as well as approach. Synthesizing legal rules and psychological research on jury instructions, Professor Tanford presents an elegant application of jury research and related bodies of knowledge in cognitive and social psychology. He presents startling, albeit well validated and to some extent commonsense conclusions that jurors neither understand nor obey the law and that judicial admonitions only make things worse. Thus, while showing the necessity of a sophisticated appreciation of the legal process in identifying the implications of empirical research findings (in effect, challenging psychology), Tanford's primary challenge is to the law itself to develop procedures and evidentiary rules that better comport with the law's stated purposes.

Mark Soler⁶⁰ and Carole Shauffer also use social science to offer a challenge to legal policy,⁶¹ although they may not go as far in doing so as they should have. The framework with which they begin their analysis is consistent with that employed elsewhere in the Symposium. Showing the problems that have plagued child mental health policy, they argue for law and policy in which the realities of children's services would comport more closely with de jure values of child welfare and family integrity.

Mr. Soler and Ms. Shauffer may have given greater credence than is warranted, though, to *coordination* of services. Although coordina-

58. J. FRANK, *LAW AND THE MODERN MIND* (1930).

59. Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71 (1990).

60. Soler previously was a visiting professor in the Nebraska Program.

61. Soler & Schauffer, *Fighting Fragmentation: Coordination of Services for Children and Families*, 69 NEB. L. REV. 278 (1990).

tion of planning (as in the Child and Adolescent Service System Program [CASSP], which they discuss) makes sense in a context in which the various children's service systems have overlapping clientele and purposes,⁶² coordination often will be insufficient at the case level. Outcome research suggests that *integration* of services, not mere coordination, is necessary for the multi-problem youth and families who fill each of the major child service systems (i.e., child welfare, child mental health, juvenile justice, and special education).⁶³ In most cases, a single intensive, flexible intervention is needed that incorporates personal, family, school, and community elements. The model of an hour a week with the psychologist, occasional contacts by the parents with a social worker, and so forth does not work, even if the various professionals do keep in touch with each other. Perhaps this idea is implied in Soler and Shauffer's point that coordination of ill-conceived programs serves no purpose. Given current funding strictures, coordination also may be the best that can be done without more fundamental reform. Psycholegal research might be useful in that regard in evaluating the efficacy of various legal structures that might be used in the promotion of integrated services for troubled youth and their families.

In contrast to Tanford and to Soler and Shauffer, Jeffrey Pfeifer, a PhD-MLS student in the Nebraska Program, challenges psychology. He offers apt cautions about the limits of social science methods and the need to base psycholegal research firmly within both a realistic context and the state of the art in scientific theory and research.⁶⁴ In its specific content, Mr. Pfeifer's Comment stands in apparent juxtaposition to Professor Tanford's Article, in that Mr. Pfeifer's general conclusion is that juries may be better decision makers than much of the psychological literature suggests.

Of course, jurors' limitations in comprehending instructions are of little import if their intuition about the appropriate standards matches that of the law. In that regard, as I have noted elsewhere,⁶⁵ virtually

62. See Melton, *Law and Random Events: The State of Child Mental Health Policy*, 10 INT'L J. L. & PSYCHIATRY 81 (1987).

63. See generally S. HENGGELE & C. BORDUIN, FAMILY THERAPY AND BEYOND: A MULTISYSTEMIC APPROACH TO TREATING THE BEHAVIOR PROBLEMS OF CHILDREN AND ADOLESCENTS (1990); G. MELTON & D. HARGROVE, PLANNING MENTAL HEALTH SERVICES FOR CHILDREN AND YOUTH (forthcoming); Melton, *The Jericho Principle: Lessons from Epidemiological Research*, in SOCIAL WORK EDUCATION FOR WORKING WITH SERIOUSLY EMOTIONALLY DISTURBED CHILDREN AND ADOLESCENTS (L. Abramczyk ed. 1989).

64. Comment, *Reviewing the Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?*, 69 NEB. L. REV. 230 (1990) (authored by Jeffrey E. Pfeifer).

65. Melton, *Introduction: The Law and Motivation*, in 33 NEBRASKA SYMPOSIUM ON MOTIVATION: THE LAW AS A BEHAVIORAL INSTRUMENT xiii, xvii-xviii (G. Melton ed. 1985).

all jury research has been instrumental in orientation: how well do juries comprehend instructions, and how well do their decisions match the decision trees established in the instructions? Jury researchers might profitably begin to focus more on the symbolic functions of the jury: what is the meaning of the experience of jury service for jury members themselves, litigants, and the community as a whole? Such questions have relevance in the development of law as a system that enhances sense of community and inculcates community norms.

Like the preceding authors, Alan Tomkins, a faculty member in the Nebraska Program, examines the instrumentality and rationality of decision making in a particular legal context (*i.e.*, dispositional orders in juvenile courts).⁶⁶ Although he does conclude that the decisions by juvenile justice professionals generally are based on the complex factors related to both rehabilitation and punishment that they purport to be considering. Professor Tomkins's approach is essentially neutral. He does not evaluate whether juvenile justice professionals are making "good" decisions but instead offers a method for determining the match between *de jure* and *de facto* policies in processing cases. Therefore, as Tomkins points out,⁶⁷ his method is potentially applicable as an administrative tool in monitoring whether the coordinated policies that Soler and Shauffer advocate actually are implemented among the various actors in the child and family service system.

The remaining commentaries in the Symposium focus on issues in mental health law, an area of obvious and continuing concern for psycholegal scholars. Emily Campbell, a JD-PhD student in the Program, illustrates the sensitivity of contemporary scholars of social science in law to the distinctions between normative and empirical issues in the law.⁶⁸ Ms. Campbell's work fits well in that regard with the prevailing views among psycholegal scholars about the limits of mental health professionals' expertise in determining criminal responsibility, a question that by its nature is moral and legal but not scientific.⁶⁹

66. Tomkins, *Dispositional Decisionmaking in the Juvenile Justice System: An Empirical Study of the Use of Offense and Offender Information*, 69 NEB. L. REV. 298 (1990).

67. *Id.*

68. Comment, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?*, 69 NEB. L. REV. 190 (1990)(authored by Emily Campbell).

69. See generally G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (1987); Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978); Morse, *Failed Explanations*

James Ogloff (a J.D.-Ph.D. graduate of the Program), David Finkelman (a former post-doctoral fellow in the Program), Randy Otto (also a former post-doctoral fellow, who obtained an M.L.S. degree in the Program), and Denise Bulling (a mental health professional in Lincoln) describe the implementation of a Nebraska statute designed to reduce the abominable practice of jailing non-criminal individuals with acute mental disorders as a means of warehousing them until they can be hospitalized.⁷⁰ Ogloff and his colleagues show that the provision of a crisis center not only has resulted in its intended benefit but that it also has had the positive side effect of avoiding a substantial number of unnecessary civil commitments.⁷¹ In that regard, this Article stands in contrast to Christopher Slobogin's⁷² provocative but, in my opinion, conceptually and empirically flawed attack on the *community-first* principle.⁷³ Jillane Hinds finds a mid-

and *Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971 (1982).

70. Ogloff, Finkelman, Otto & Bulling, *Preventing the Detention of Non-criminal Mentally Ill People in Jails: The Need for Emergency Protective Custody Units*, 69 NEB. L. REV. 433 (1990).

71. Ogloff *et al.*'s approach is consistent with the developing ethos in mental health policy in which the historic ideological conflict between "legal" and "medical" models is deemphasized in favor of a focus on development of pragmatic policies that produce humane and respectful responses to people with mental disabilities. See generally Wexler & Schopp, *Therapeutic Jurisprudence: A New Approach to Mental Health Law*, in HANDBOOK OF PSYCHOLOGY AND LAW (D. Kagehiro & W. Laufer eds. forthcoming) (chapter co-authored by a faculty member in the Nebraska Program in a volume co-edited by a former post-doctoral fellow in the Nebraska Program).

72. Slobogin, *Treatment of the Mentally Disabled: Rethinking the Community-First Idea*, 69 NEB. L. REV. 413 (1990). Professor Slobogin is a former visiting professor in the Nebraska Program. He also is an ongoing collaborator in my own work related to mental health law. *E.g.*, G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, *supra* note 69; G. MELTON, L. WEITHORN & C. SLOBOGIN, *COMMUNITY MENTAL HEALTH CENTERS AND THE COURTS: AN EVALUATION OF COMMUNITY-BASED FORENSIC SERVICES* (1985).

73. A full rebuttal to Professor Slobogin's argument would go well beyond the scope of this Introduction. However, his commentary is based on an incomplete review of the relevant empirical research. With no stated justification, Slobogin also reverses the prevailing presumptions in law and philosophy requiring that the state demonstrate a compelling justification for deprivation of fundamental rights and discrimination on the basis of status. In fact, as he tacitly acknowledges, no studies have shown superiority of hospital-based treatment, a remarkable fact in a society that ostensibly reveres freedom and equality as primary values but that nonetheless persists in subjecting people with mental disabilities to unduly restrictive, intrusive, and expensive services that are without documented efficacy. Indeed, a much stronger argument can be made for *abolition* of civil commitment than for diminution of substantive due process rights of people with mental disabilities. See generally C. KIESLER & A. SIBULKIN, *MENTAL HOSPITALIZATION: MYTHS AND FACTS ABOUT A NATIONAL CRISIS* (1987); Melton & Garrison, *Fear, Prejudice, and Neglect: Discrimination Against Mentally Disabled Persons*, 42 AM. PSYCHOLOGIST 1007 (1987); Morse, *A Preference for Liberty: The Case*

dle ground in which she urges caution in deprivation of liberty, even on an outpatient basis, but in which she argues that outpatient commitment sometimes prevents greater restrictions on liberty.⁷⁴

The content of the Symposium is diverse, and the views expressed within it are sometimes in conflict. Nonetheless, without exception, the authors have adopted original approaches to important problems of legal regulation of human behavior.

IV. CONCLUSION: JUSTICE BLACKMUN AS A MODEL

The potential utility of the social science in law perspective for judicial decision making and the perspective's normative underpinnings can also be illustrated by leaving the Nebraska example for a moment and examining the work of a familiar jurist, Justice Harry Blackmun. At its biennial meeting in 1990, AP-LS gave Justice Blackmun its award for distinguished contributions to psychology and law. The introductory remarks and award citation by Thomas Grisso, then president of AP-LS, focused on the ways that Justice Blackmun was a kindred spirit to the academicians, forensic clinicians, and policymakers who compose AP-LS's membership.⁷⁵ In so doing, Professor Grisso not only provided a moving account of the contributions that Justice Blackmun has made to the nation but also a concise statement of the values that are embedded in psychological jurisprudence and social science in law, a point on which I will elaborate.

Justice Blackmun's approach to his work, especially in recent years, has been marked by two themes that at first glance may appear paradoxical. On the one hand, Justice Blackmun has been the Supreme Court's scientist, carefully seeking and applying empirical evidence in a rational, pragmatic approach to the Court's policymaking role.⁷⁶ Presumably relying on his undergraduate education as a

Against Involuntary Commitment of the Mentally Disordered, 70 CALIF. L. REV. 54 (1982). That judges, legislators, and mental health administrators rarely have taken the community-first principle seriously is not reason to abandon it; rather, the principle should be strengthened with sufficient attention to procedures for implementation to give it practical meaning. Nonetheless, Slobogin's point that positive effects of tacit commitment to the community-first principle should not be presumed without empirical evidence is well taken and within the spirit of this Symposium.

74. Hinds, *Involuntary Outpatient Commitment for the Chronically Mentally Ill*, 69 NEB. L. REV. 346 (1990). Ms. Hinds is a J.D.-M.A. graduate of the Nebraska Program.

75. T. Grisso, Introduction to Invited Address by J. Blackmun to the American Psychology-Law Society, Williamsburg, Va. (Mar. 16, 1990) [hereinafter T. Grisso, Introduction]; T. Grisso, Remarks on the Presentation of the American Psychology-Law Society Award for Distinguished Contributions to Psychology and Law to J. Blackmun, Williamsburg, Va. (Mar. 16, 1990) [hereinafter T. Grisso, Remarks].

76. In his own largely extemporaneous address to AP-LS, Justice Blackmun made clear the value that he places on briefs submitted by APA and other amici curiae

mathematics major at Harvard and his experience as counsel to the Mayo Clinic, Justice Blackmun has cited empirical evidence in more than 300 cases, an unprecedented level of attention to social facts.⁷⁷ He also was the author of the first Supreme Court opinion heavily relying on social science evidence,⁷⁸ evidence that was developed through judicial notice without presentation by the litigants either at trial or in briefs.⁷⁹

On the other hand, Justice Blackmun has been the Court's moral authority, not just its empirical authority. His opinions have been notable as much for their passion as their recitation of statistics. He has been a voice for the inarticulate and the powerless in numerous legal contexts,⁸⁰ and his humility has been matched by his outrage at the Court's increasing insensitivity and inflexibility in the face of injustice and tragedy.⁸¹ I know of no judicial opinion more anguished or more powerful than Justice Blackmun's brief dissent from the Court's failure to see a violation of fundamental rights when the state has know-

who present scientific evidence for the Court's consideration. He at least implicitly invited still greater involvement in the Court by the two APAs (the American Psychological Association and the American Psychiatric Association), who he indicated were among the most persuasive groups to come before the Court. Just prior to the AP-LS meeting, Justice Blackmun had penned a brief concurring opinion in *Washington v. Harper*, 110 S. Ct. 1028 (1990), in which he had indicated his consternation in weighing the competing scientific arguments by the two APAs on the question of the effects of antipsychotic medication.

For a detailed discussion of Justice Blackmun's empiricism, see Schlesinger & Nesse, *Justice Harry Blackmun and Empirical Jurisprudence*, 29 AM. U.L. REV. 405 (1980).

77. T. Grisso, Introduction, *supra* note 74, at 3. The remarkable quantity and quality of Justice Blackmun's consideration of empirical evidence can best be appreciated by examination of the records of other 20th-century judges. See P. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 212-17 (1972) and citations therein; Hafemeister & Melton, *The Impact of Social Science Research on the Judiciary*, in *REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH* (G. Melton ed. 1987). See also A. Brown, *The Utilization of Social Science Research by the Judiciary: A Quantitative Analysis of Obscenity Opinions* (1989); P. Falk, *Courts' Citation and Reference to Social Science in Legal Opinions Involving Gay Individuals* (1988); and T. Hafemeister, *The Impact of Social Science Materials on the Judiciary: A Qualitative and Quantitative Analysis* (1988) (doctoral dissertations in the Law/Psychology Program, University of Nebraska-Lincoln, in which quantitative and qualitative analyses have been undertaken of courts' use of social science).

78. *Ballew v. Georgia*, 435 U.S. 223 (1978).

79. J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 488 (1st ed. 1985).

80. T. Grisso, Introduction, *supra* note 74, at 2 (citing Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985)).

81. See, e.g., *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3067 (1989) (Blackmun, J., concurring in part and dissenting in part); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

ingly permitted a child to be subjected to a life-threatening (and ultimately disabling) living situation:⁸²

Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. . . .

Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. . . .

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of patriotic fervor and proud proclamations about "liberty and justice for all," that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother . . . deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.⁸³

Poor Joshua! In that phrase lies the clue to the resolution of the paradox. Just as the sociological jurisprudes and the realists sought to foster sensitivity by the law to individual circumstances⁸⁴—to human dilemmas—Justice Blackmun strives to sustain a legal system respectful of the dignity of the individual, no matter how disadvantaged his or her station in life. That is a grand and noble purpose—a purpose demanding passion. At the same time, if people are to be taken seriously (perhaps the essence of respect for dignity), legal decision makers should consider the best available evidence about the social realities in which litigants (and those whose lives will be shaped by litigation in which they are not parties) find themselves. In short, Justice Blackmun has recognized that a legal system that takes individuals seriously and that builds and sustains a sense of community requires both moral fervor and good data.

As Professor Grisso stated more succinctly, "What we can see is his [Justice Blackmun's] recognition that scientific fact can often provide a necessary real-world context with which a considered interpretation of the Constitution should have to struggle."⁸⁵ It is that perception that drives contemporary psycholegal scholarship—a worldview not

82. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 109 S. Ct. 998, 1012 (1989).

83. *Id.* at 1012-13.

84. See, e.g., Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Pound, *supra* note 12, at 710.

85. T. Grisso, Introduction, *supra* note 74, at 4.

far from that adopted by Dean Pound at Nebraska nearly a century ago. Today, though, we have the benefit of more valid scientific methods and better developed ideas about the legal and moral requisites of personhood.

That is a heady perspective from which to view legal problems. It offers challenges to jurists to look carefully at the experience that citizens have of the law and to evaluate whether the law is meeting its grander aims, whether in the resolution of tragic dilemmas or in the enhancement of everyday life. At the same time, it requires psychologists of law to expand their work to ask questions that are likely to yield answers informative to those who seek a humanistic legal system capable of guiding the community and enhancing dignity.

Both disciplines and the interdisciplinary enterprise that they have spawned still have far to go before their potential is realized, but I suspect that this Symposium will be viewed ultimately as a significant step in the right direction.

APPENDIX A

Presentations by UNL Faculty, Fellows, Students, and Graduates at the 1990 Meeting of the American Psychology-Law Society

- M. Aubrey & J. Ogloff, Survey of Forensic Training in APA Internships
- K. Boucher, Factors Affecting the Use of Social Scientific and Statistical Evidence in Discrimination Cases
- K. Boucher, R. Macolini, & R. Thompson, Rights of Unwed Fathers
- J. Greenwald, A. Tomkins, & M. Kenning, Psychological Self-Defense: Verdicts for Battered Women Defendants
- T. Hafemeister & P. Falk, Impact of Social Science Materials on the Judiciary
- S. Limber, G. Melton, & S. Rahe, Legal Knowledge, Attitudes, and Legal Reasoning Abilities of Child Witnesses
- G. Melton, Psychological Jurisprudence in the Context of the Law and Society Movement
- K. Moore & M. Small, Problem Solving Skills of Adolescent Inpatients: Implications for Civil Commitment of Minors
- J. Moreland, Behavior of American Indian Law
- V. Murphy-Berman & J. Berman, Attitudes About AIDS: Comparisons of Students from Law and Psychology
- J. Ogloff, Community Health Centers to Provide Services to Local Jails
- R. Peters & R. Otto, The Florida Forensic Evaluator Training Program
- J. Rothweiler & R. Wiener, Psychological Testing and Test Bias in the Assessment of Black and White Populations
- M. Scalora, R. Thompson, S. Limber & L. Castrianno, Grandparent Visitation Rights
- M. Steward & D. Steward, Comparison of Traditional and Computer-Assisted Interviews with Young Children
- D. Wolfe & R. Macolini, Juror Comprehension in Complex Cases: An Examination of Juror Notetaking and the Insanity Defense
- D. Wolfe, A. Tomkins, K. Olson, et al., Out-of-Home Placements for Juveniles: Empirical and Policy Issues and the Use of Focus Groups for Data Acquisition

APPENDIX B

Doctoral Dissertations in the Law/Psychology Program, 1979-89 Robinsue Frohboese, **Parental Opposition to Deinstitutionalization: A Challenge in Need of Attention and Resolution (1979)**

Thomas D. Overcast, **The Development and Evaluation of Handbooks Providing Law Related Information for the Elderly (1980)**

David L. Suggs, **A Qualitative and Quantitative Analysis of the Impact of Nebraska's Decriminalization of Marijuana (1980)**

H. Roberts O'Neal, **Communication Across Cultures: American Subcultures and the Culture of the School (1982)**

Ruth A. Parvin, **Long-term Effects of Sexual Assaults (1982)**

James D. Herbsleb, **Application of Attribution Theory to Judgments of Credibility (1984)**

Kent A. Wilson, **Retribution, Public Opinion, and Criminal Sentencing (1984)**

Roberta A. Morris, **Methods in Psycholegal Research (1987)**

W. LeAnn Wallace, **The Community Penalties Act of 1983: An Evaluation of the Law, Its Implementation, and Its Impact in North Carolina (1987)**

Linda Whobrey Rohman, **The Nebraska Prehearing Settlement Conference Program: An Experimental Evaluation (1987)**

Patricia J. Falk, **Courts' Citation and Reference to Social Science in Legal Opinions Involving Gay Individuals (1988)**

Thomas L. Hafemeister, **The Impact of Social Science Materials on the Judiciary: A Qualitative and Quantitative Analysis (1988)**

Glen D. Skoler, **Saviours of the Nation, Assassins of the Self: Psychodynamic Characteristics of Presidential Threateners and Other Secret Service Cases (1988)**

Allen J. Brown, **The Utilization of Social Science Research by the Judiciary: A Quantitative Analysis of Obscenity Opinions (1989)**

Mario J. Scalora, **Mentally Disordered Sex Offenders: A Comparison with Other Sex Offenders on Clinical and Legal Factors (1989)**

Mark B. DeKraai, **Impact of Litigation on Developmental Disabilities Services (1990)**

Lois Oberlander, **Cognitive Processes and Clinical Decision Making Patterns Among Mental Health Professionals: An Empirical Demonstration (1990)**

James R. P. Ogloff, **A Comparison of the Impact of Insanity Defense Standards on Juror Decision-Making (1990)**

A. Jocelyn Ritchie, **Effects of Ethanol on Developing Organisms (1990)**

Mark Small, **The Role of Perceptions of Privacy Invasions in a Psychology of Jurisprudence (1990)**

Daniel Wolfe, **Juror Comprehension in Complex Cases: An Examination of Juror Notetaking and the Insanity Defense (1990)**